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No. 82-

In The

Supreme Court of the United States

October Term, 1982

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Petitioner,

v.

MCI COMMUNICATIONS CORPORATION and MCI TELECOMMUNICATIONS CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: July 8, 1983

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QUESTION PRESENTED

Whether, under the Due Process Clause, the Seventh Amendment and the rule of *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), a court of appeals, in reversing a treble damages antitrust judgment and specific jury findings of liability, may affirm closely related findings on liability and limit a retrial to damages where: (a) the reviewing court acknowledged the "possibility" that the jury findings that were affirmed had been "tainted" by the jury findings that were reversed; and (b) the jury findings affirmed are so vague that damages cannot reasonably be assessed on the basis of those findings, without consideration of substantial evidence relating to liability.

STATEMENT REQUIRED BY RULE 28.1

In addition to wholly-owned subsidiaries, petitioner American Telephone and Telegraph Company ("AT&T") has ownership interests in The Southern New England Telephone Company, Cincinnati Bell, Incorporated and the Cuban American Telephone and Telegraph Company.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. A, 2a), as modified by its order of April 11, 1983, denying rehearing, is not yet officially reported. The opinion is unofficially reported at 1982-83 Trade Cas. ¶65,137. The order of the Court of Appeals denying petitions for rehearing (App. B, 240a) is not reported. The District Court did not directly address the questions presented; however, its instructions to the jury and the jury's special verdict are an Appendix to the Court of Appeals' opinion (App. A, 210a-238a).

JURISDICTION

The judgment of the Court of Appeals was entered on January 12, 1983. Timely petitions for rehearing, with suggestions for rehearing en banc, were denied on April 11, 1983 (App. B, 240a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

United States Constitution, Amendment VII:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."

Section 2 of the Sherman Act, 15 U.S.C. §2:

> "Every person who shall monopolize . . . any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . . ."

Section 4 of the Clayton Act, 15 U.S.C. §15:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained . . . ."

STATEMENT OF THE CASE

This petition presents a narrow, recurring, and vitally important question of procedure and practice for jury trials in civil actions. Following a jury trial of this complex antitrust case, the Seventh Circuit here reversed findings that were critical to the judgment entered against petitioner ("Bell") on the ground

that the findings were unsupported as a matter of law. However, the Seventh Circuit affirmed other, related liability findings and remanded the case for a retrial limited to such damages as were sustained by respondent ("MCI"). The court reasoned that the jury's liability findings it affirmed had not been "so clearly tainted" by the liability findings it reversed as to require a new trial on the remaining liability issues and that it would be possible for a second jury, on retrial limited to damages, to ascertain what conduct the first jury had found to be unlawful.

This decision flatly conflicts with the decisions of this Court and virtually every Court of Appeals. Where, as here, there is a "possibility of spillover" such that the jury's liability findings which were affirmed could have been tainted by findings which were reversed, a retrial extending to liability on the issues remaining is mandatory. Similarly, where, as here, the first jury's liability findings which were affirmed are so imprecise that a second jury may not assess damages, and there are questions of mitigation that will require the introduction of substantial liability evidence before damages may be assessed, a retrial limited to damages is improper.

A. The Factual Background of This Case.

The issues presented to the jury in this case grow directly out of controversies that arose following a dramatic change in the regulatory policies of the Federal Communications Commission that began to evolve in 1971 with the decision in *Specialized Common Carriers*, 29 F.C.C.2d 870 (1971), *aff'd sub nom. Washington Utilities & Transportation Comm'n v. FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). In that decision, the FCC authorized, for the first time, the general entry of new carriers like MCI to provide "specialized" private line services in competition with AT&T. The decision, however, did not define the specialized services in which it authorized the new carriers to engage; nor did it define the obligations which AT&T

and the other established carriers were expected to assume in relation to the new carriers. In this respect, the *Specialized Common Carriers* decision was, as the Court of Appeals recognized, "hardly a model of clarity" (App. A, 12a); indeed, the trial court characterized it as an "abomination" and "one of the worst examples of legal draftsmanship I have ever seen" (App. A, 12a n.13).

The meaning of the *Specialized Common Carriers* decision immediately became a source of controversy within the industry. The early disputes involved interconnection. These interconnection controversies were of two broad kinds. The first related to the scope of the "specialized services" the new carriers were authorized to provide and the extent of AT&T's corresponding obligation to provide interconnections for such services to these carriers. This issue arose in the context of whether AT&T was required to provide MCI access to Bell switching machines to enable MCI to offer services known as FX (Foreign Exchange) and CCSA (Common Control Switching Arrangements). The second related to the determination of a fair price for the local interconnections (known as local loops) provided by Bell to enable MCI to reach the premises of its customers.[1]

Questions also arose as to the pricing policies that AT&T would be permitted to pursue with respect to services competitive with those offered by MCI and other specialized carriers. These pricing controversies were also of two kinds. The first related to the rate level and rate structure of an AT&T tariff known as Telpak, which provided large quantities of private line channels to business and government users at reduced rates and had been subject to continuous FCC investigation since being introduced in 1961. The second related to the rate level and rate

[1]Specialized carriers such as MCI operated microwave radio systems that transmitted communications between terminals in the cities the carriers served. In order to complete the communications from their terminal to their customers, the specialized carriers had to use Bell's local facilities (App. A, 85a).

structure of a tariff known as Hi/Lo, which was AT&T's competitive response to MCI's entry and which, upon taking effect in 1974, deaveraged AT&T's single-channel private line rates to conform more closely to costs.

B. The Proceedings in the District Court.

MCI filed the complaint in this case on March 6, 1974, alleging violations of Sections 1 and 2 of the Sherman Act. At that time, none of the controversies described above had been definitively resolved by the FCC. The complaint was broad, alleging a course of illegal monopolization that consisted of 22 separate charges, all of which fell into one of the following categories: (1) a pattern of allegedly predatory pricing, including the Telpak and Hi/Lo tariffs; (2) the imposition of allegedly excessive and discriminatory prices for local loops MCI needed to offer its customers a complete end-to-end service; and (3) the imposition of allegedly unlawful restrictions upon MCI's right to obtain certain kinds of interconnections, including FX and CCSA.

MCI's case against AT&T was tried and submitted to the jury as a single course of conduct to monopolize, in which the same anticompetitive intent was alleged to have motivated AT&T's action with respect to both interconnection and pricing. MCI consistently claimed — throughout the presentation of evidence and in its damages study — that all of the charges were illustrative of a single anticompetitive intent (see, *e.g.*, App. A, 146a-147a). Likewise, in responding to MCI's case, AT&T presented what was essentially a unitary defense, defending the charge of unlawful interconnection refusals on the same theory as it defended the Hi/Lo tariff: in both instances, AT&T pointed to its nationwide averaged rate structure and the threat of creamskimming.[2]

[2]This Court recognized the inevitable, adverse effect of selective, specialized competition directed at the "cream" of the business of a general service public utility in *Panhandle Eastern Pipe Line Co.* v. *Michi-*

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At the close of MCI's case, the District Court dismissed seven of the original 22 charges, but the remaining fifteen ultimately went to the jury. MCI asked that the case be submitted under a general verdict on the theory that a single violation was alleged, but the trial court submitted the case pursuant to a special verdict requiring the jury to answer several separate questions. Nevertheless, the court directed the jury to consider "each distinct aspect of AT&T's conduct . . . in the context of all AT&T's conduct" (Inst. 44, App. A, 231a), and instructed the jury that the test to be applied to each charge submitted was AT&T's subjective intent. Moreover, with respect to antitrust injury, the verdict form did not relate the jury's finding to the specific charges of misuse of monopoly power; instead, the jury was instructed to find injury from "any one or more of the defendant's acts" (Int. 6, App. A, 238a).

With respect to the fifteen specific conduct charges, the jury found in AT&T's favor on five, including the charges that the Telpak tariff was predatory and that local loop prices were unlawful (App. A, 2 a-238a). The jury found in MCI's favor on two charges related to the Hi/Lo tariff and eight charges related to the interconnection disputes (*id.*). The jury found that MCI had been injured as a result of "one or more of defendant's acts" and found damages in the amount of $600 million. The District Court entered judgment for trebled damages of $1.8 billion.

C. The Court of Appeals' Decision.

On cross-appeals, the Court of Appeals upheld the jury's finding in AT&T's favor with respect to Telpak and, in addition,

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gan Public Service Comm'n, 341 U.S. 329 (1951). In upholding an order of the Michigan Public Service Commission precluding selective competition by an interstate gas supplier, the Court reasoned (341 U.S. at 334):

> "Appellant asserts a right to compete for the cream of the volume business without regard to the local public convenience or necessity. Were appellant successful in this venture, it would no doubt be reflected adversely in Consolidated's overall costs of service and its rates to customers whose only source of supply is Consolidated."

set aside the jury's findings and rendered judgment for AT&T on the charges involving the Hi/Lo tariff. Thus, the Seventh Circuit eliminated entirely the charge that AT&T engaged in predatory pricing. The court also upheld the jury's finding that Bell's local loop prices were lawful. And it rejected MCI's damage study as being based upon unsupported assumptions regarding MCI's average revenues, costs, and volume of business.

At the same time, however, the court upheld six of the eight jury findings against AT&T with respect to interconnection. The court remanded the case for a new trial limited to damages on those interconnection charges, stating that "[a] new trial on liability is unwarranted since this court has affirmed liability for monopolization on the basis of most of AT&T's actions involving interconnection with MCI" (App. A, 154a).

In response to AT&T's argument in its petition for rehearing that the partial retrial order conflicted with this Court's decision in *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), the Seventh Circuit modified its earlier decision to add several footnotes, two of which are relevant here (App. B, 241a-242a).

First, the court addressed AT&T's argument that "the intent evidence presented on the predatory pricing claims, which we reject, was inextricably interrelated with the intent evidence applicable to the findings on the interconnection claims which we approve" and thus that those predatory pricing findings "necessarily tainted" the interconnection findings (App. B, 241a). The court rejected this argument as based upon "unfounded speculation about the jury's mental processes," and, even though it recognized the "possibility of spillover among claims," held that "the jury's determination that Hi-Lo was predatory did not so clearly taint its ability to decide the interconnection claims" (*id.*):

> "On the face of things, because reductions in price, unlike the denial of interconnections, may be pro-competitive as

> well as anticompetitive, we think the 'intent' relevant to pricing is not *necessarily* closely linked to the 'intent' relevant to refusals of interconnection. Further, the jury itself exonerated AT&T on the important Telpak pricing claim while finding monopolistic intent in the denials of interconnection. Particularly in the context of this unusual case, *we believe we should balance the possibility of spillover among claims against the prejudice to the prevailing party in the overturning of the jury's findings. The jury's determination that Hi-Lo was predatory did not so clearly taint its ability to decide the interconnection claims that justice would be served by overturning the jury verdicts on these interconnection claims.*" (Emphasis supplied.)

Second, the court addressed AT&T's argument that the jury's answers to the special verdict questions did not define the conduct found unlawful "with sufficient clarity to separate the issue of damages from the . . . issue of liability so as to permit a new trial limited to the question of damages alone" (App. B, 241a-242a). The court also rejected this argument, holding (*id.*):

> "As indicated, *we believe that the district court and counsel can, on the basis of the record and in accordance with the procedure in this opinion, sufficiently identify the conduct found unlawful by the first jury to separate the issues relevant to damages for trial.*" (Emphasis supplied.)

REASONS FOR GRANTING THE WRIT

AT&T recognizes that there is no final judgment of the Court of Appeals against it in this case and that full review at this stage might therefore be considered premature. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & A. R. R.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Accordingly, AT&T does not seek review at this time of any of the Court of Appeals' substantive findings or ask this Court to engage in any review of the factual record. The present petition addresses an extremely narrow, but manifestly serious, error of law in the order entered by the Court

of Appeals, which, although not technically final, is plainly within this Court's power to review and can be reviewed without undue burden upon the Court. Moreover, there is every reason that this narrow question, which is "fundamental to the further conduct of the case," should be reviewed now. R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE, §4.19 at 301 (5th ed. 1978). See also *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947). Unless this Court addresses the scope of the retrial to which AT&T is entitled, not only a second but a third trial of this complex action may be required. This would seriously affect the administration of justice and would defeat the very objectives which the Court of Appeals apparently was attempting to achieve.

I. The Standard Applied By The Court Of Appeals To Determine Whether The Jury Findings That Were Affirmed Were Tainted By The Jury Findings That Were Reversed Cannot Be Reconciled With *Champlin* Or With Other Circuits' Interpretation Of *Champlin*.

In *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), this Court held that it is constitutionally permissible to remand for a new trial limited to damages only in narrowly restricted circumstances (*id.* at 500):

> "[A] partial new trial . . . may not properly be resorted to *unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice*. . . . Here the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." (Emphasis supplied.)

This substantial limitation derives from the Seventh Amendment right to a "fair and equitable resolution of factual issues" by the jury. *Colgrove* v. *Battin*, 413 U.S. 149, 157 (1973). It is a right

which supersedes even the unquestionably legitimate interest in saving "the parties and the commonwealth . . . the expense, annoyance and delay of a retrial." *Simmons* v. *Fish*, 210 Mass. 563, 565 (1912), *relied upon in Gasoline Products Co., Inc.* v. *Champlin Refining Co., supra*, 283 U.S. at 500-01.

In recognition of the unequivocal mandate of *Champlin*, the Courts of Appeals have required *clear* proof that reversed findings could not have tainted the remaining findings before allowing retrial of damages or liability only. The D.C. Circuit, in *Camalier & Buckley-Madison, Inc.* v. *Madison Hotel, Inc.*, 513 F.2d 407, 422 (D.C. Cir. 1975), ordered a new trial on damages as well as liability because the court "*lack[ed] reasonable assurance*" that the sustainable findings were not tainted (emphasis supplied). The Second Circuit, too, has ordered full retrial where it "cannot be said that there '*clearly*' *was no relationship*" between the erroneous findings and those which otherwise would have been upheld. *Ajax Hardware Manufacturing Corp.* v. *Industrial Plants Corp.*, 569 F.2d 181, 185 (2d Cir. 1977) (emphasis supplied). Most recently, the Second Circuit in *Northeastern Tel. Co.* v. *American Tel. & Tel. Co.*, 651 F.2d 76, 94-95 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982), ordered a full new trial on the remaining charge because it could not "*be certain* that the jury based its verdict exclusively on the one remaining practice, *without any spill-over from the practices we have found not to have been anticompetitive*" (emphasis supplied).[1]

The Fifth Circuit has also adopted a "clear" absence of taint standard. In *Williams* v. *Slade*, 431 F.2d 605, 608 (5th Cir. 1970), the court stated that, under *Champlin*,

> " . . . a court may properly award a partial new trial only when the issue affected by the error could have *in no way*

[1] In another case, the Second Circuit upheld a partial retrial order because there was "*no possibility* of confusion and uncertainty in separating the two issues, as there was in the Gasoline Products case." *Eichel* v. *New York Central R. R.*, 319 F.2d 12, 20 (2d Cir.), *rev'd on other grounds*, 375 U.S. 253 (1963) (emphasis supplied).

> *influenced* the verdict on those issues which will not be included in the new trial. If the decision on the other issues *could in any way have been infected by the error then a new trial must be had on all issues.*" (Emphasis supplied.)[4]

The Eighth Circuit has similarly required that the court be able to "state with *reasonable assurance* that the [error] . . . did not influence or materially affect the jury's verdict." *Vagle* v. *Pickands Mather & Co.*, 611 F.2d 1212, 1219 (8th Cir. 1979), *cert. denied*, 444 U.S. 1033 (1980) (emphasis supplied). And the Third and Sixth Circuits have ruled that partial new trials should be granted " 'only in those cases *where it is plain that the error which has crept into one element of the verdict did not in any way affect the determination of any other issue.*' " *Romer* v. *Baldwin*, 317 F.2d 919, 922-23 (3d Cir. 1963), *quoting Thompson* v. *Camp*, 167 F.2d 733, 734 (6th Cir.), *cert. denied*, 335 U.S. 824 (1948) (emphasis supplied).

Under any of these formulations, this case necessarily would have been remanded for a new trial on both the damages and liability aspects of the remaining interconnection issues. The predatory pricing and interconnection charges were so inextricably intertwined throughout all stages of the trial that there cannot possibly be any "reasonable assurance" that the jury's findings with respect to the pricing of Hi/Lo — which the Court of Appeals properly held should never have been before the jury — did not taint the findings on the interconnection charges.[5] Indeed, the

[4]See also *Hayes* v. *Solomon*, 597 F.2d 958, 985 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980) (retrial on liability and damages required even though one claim had "its own separate theoretical viability" because of "the very real likelihood that the jury may have utilized an unproven or improper theory of liability"); *Johnson* v. *Greer*, 477 F.2d 101, 108 (5th Cir. 1973) (reversal is the "only sure course" to preserve jury process for both parties).

[5]The conclusion that the jury's adverse Hi/Lo finding tainted its interconnection findings is unaffected by the Court of Appeals' statement in

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jury was expressly instructed to consider each of MCI's charges "in the context of all of AT&T's conduct" (Inst. 44, App. A, 231a), and the specific instruction on Hi/Lo necessarily tied that charge to the interconnection charges. Under the Hi/Lo instruction, if the jury found Hi/Lo to be below cost, it was entitled to infer predatory intent (Inst. 42, App. A, 230a). Thus, once the jury found against AT&T with respect to Hi/Lo, it could hardly have found anything but predatory intent with respect to the interconnection charges, which under the instructions also turned on intent.[6]

The Seventh Circuit did not order a retrial of the remaining interconnection issues, however, because it applied a different and

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its order denying rehearing that "the jury itself exonerated AT&T on the important Telpak pricing claim while finding monopolistic intent in the denials of interconnection" (App. B, 241a). As the court recognized in its decision, unlike Hi/Lo which was developed "concurrent with MCI's entry," Telpak was filed in 1961 — over 10 years before MCI first went into business between Chicago and St. Louis (App. A, 18a-19a). Thus, unlike Hi/Lo, the filing of Telpak could not have given rise to any inference concerning AT&T's intent toward MCI in the critical 1971-74 time period.

[6]Given the nature of the parties' positions, no distinction at the trial was drawn between AT&T's intent with respect to the interconnection issues and AT&T's intent with respect to the predatory pricing issues. As an example of the way the issues were intertwined, Charles Marshall, then President of Illinois Bell, testified on direct examination that MCI's interconnection charges made no sense because MCI could never make a profit selling FX and CCSA services in competition with the very low Telpak bulk rates under which AT&T provided most of these services; he demonstrated that point by showing that after MCI began offering FX and CCSA services, its revenue per circuit mile dropped precipitously. On cross-examination, however, MCI's counsel sought to explain the drop in revenue as the consequence, *not* of FX and CCSA, but of AT&T's implementation of Hi/Lo in June 1974 (Marshall, Tr. 5044-45). Thus, MCI asked the jury to reject AT&T's contention that the denial of FX/CCSA interconnections could not rationally be viewed as a tactic to put MCI out of business, arguing that AT&T combined its denial of interconnections with the filing of Hi/Lo and that these tactics together caused MCI to become unprofitable.

irreconcilable standard. Instead of requiring a retrial extending to liability and damages unless there is a "clear absence" of taint, the Seventh Circuit ordered a retrial limited to damages while expressly admitting "the possibility of spillover." In the Court of Appeals' view, this possibility of taint was not entitled to controlling weight because the various findings were "not necessarily closely linked" and could not be so considered without "speculation about the jury's mental processes." Rather, the Seventh Circuit found this to be an "unusual case," and therefore decided to "balance" the prejudice to AT&T against MCI's interests in having the interconnection findings upheld.

There is nothing "unusual" about this case that can justify the Seventh Circuit's departure from the prevailing rule of law. The *Champlin* principle has been universally applied to *all* partial retrial situations, including those where every bit as much, if not more, "speculation about the jury's mental processes" is required. Moreover, when partial retrials have been permitted under the *Champlin* standard, it has most often been in cases in which the sole error lay in the *damages* formulation.[7] And even in those cases, courts have recognized that their "power in this regard is to be exercised with caution." *Geffen* v. *Winer*, 244 F.2d 375, 376 (D.C. Cir. 1957).

Nor would there be any unfairness to MCI if the remaining interconnection charges were remanded for a new trial extending to both liability and damages. Those charges raise very close questions. Indeed, when the same interconnection issues were tried to the court sitting without a jury in *Southern Pacific Communications Co.* v. *American Tel. & Tel. Co.*, 556 F. Supp. 825, 985-1052 (D.D.C. 1983), the court found that none of AT&T's conduct violated the antitrust laws. Given this situation, MCI is not entitled to the benefit of the favorable liability findings on the

[7]See, *e.g.*, *Parker* v. *Wideman*, 380 F.2d 433, 437 (5th Cir. 1967) (where appeal taken only on amount of damages, retrial on liability unnecessary); *Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851, 857-58 (2d

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remaining interconnection charges that may have been the product of "spillover" from the pricing issues that should not have been before the jury, particularly where no trier of fact has found AT&T's conduct at issue here to violate the antitrust laws in the absence of such "spillover."

The Seventh Circuit's holding thus markedly departs from the holding in *Champlin* and the prevailing rule in other Circuits. This Court's review is necessary in order to resolve this conflict.

II. A Retrial Limited To Damages Is Directly Precluded By *Champlin* Because The Jury Findings On The Remaining Interconnection Charges That Were Affirmed Are So Vague That Damages Cannot Be Assessed On The Basis Of Those Findings.

Beyond the manifest taint that vitiates the first jury's findings of liability on the six interconnection issues, the court's remand for a trial limited to damages also violates the *Champlin* requirement that the first jury's verdict must be sufficiently precise to assure a fair trial on damages before a second jury (283 U.S. at 499-500):

> "[T]he question remains whether the issue of damages is *so distinct and independent* of the others, arising on the counterclaim, that it can be separately tried."
>
> * * *
>
> "Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is *so distinct and separable* from the others that a trial of it alone may be had without injustice . . . ." (Emphasis supplied.)

In *Champlin*, this Court reversed a lower court decision remanding that case for a trial on damages because the Court

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Cir.), *cert. denied*, 382 U.S. 816 (1965) (where error concerned only a maximum recovery instruction, retrial on liability unnecessary); *May Department Stores Co. v. Bell*, 61 F.2d 830, 842-43 (8th Cir. 1932) (error in damage instruction does not require full retrial where no indication that the error tainted liability findings).

found that the first jury's findings were not sufficiently precise to permit a jury to assess damages without retrying substantial parts of the liability case.[8] While the Court of Appeals here failed to address the issue except in conclusory terms (App. B, 241a-242a), it is obvious that none of the six interconnection findings which the Court of Appeals affirmed is sufficiently precise to allow a second jury to assess damages without the consideration of substantial evidence that relates equally to liability.

One damages-related issue which bears equally on each of the six liability findings is the question of whether MCI could have mitigated its damages by raising the interconnection matters sooner with the FCC. The trial court's mitigation instruction provided in part that if "MCI could have avoided some or all of its economic losses by complaining to the FCC and that MCI acted unreasonably in failing to complain to the FCC, you cannot award MCI the damages it could have avoided" (Inst. 56, App. A, 234a-235a). Given the Court of Appeals' recognition that AT&T had made clear to MCI as early as 1971 that it would not voluntarily provide MCI connections to Bell switching machines for FX and CCSA (App. A, 12a-13a), that the FCC and MCI told the Ninth Circuit in 1972 that switched services (such as FX and CCSA) were not within the scope of the *Specialized Common Carriers* decision (App. B, 240a), and further, that MCI did not take its complaint to the FCC until autumn of 1973 (App. A,

[8] The Court explained (283 U.S. at 499-500):

> "The verdict on the counterclaim may be taken to have established the existence of a contract and its breach. Nevertheless, upon the new trial, the jury cannot fix the amount of damages unless also advised of the terms of the contract; and the dates of formation and breach may be material, since it will be open to petitioner to insist upon the duty of respondent to minimize damages."
>
> * * *
>
> "But the present verdict, awarding as damages on the counterclaim less than the total of the items claimed by respondent, exclusive of alleged loss of profits, cannot be taken as establishing any of these material facts."

15a-16a), AT&T would be entitled to prove that MCI could and should have gone to the FCC sooner but failed to do so because of its own recognition that the FCC might not grant the relief MCI requested. But this proof relevant to mitigation also bears directly on the critical question of whether AT&T acted reasonably, in good faith, or both, and if not, over what time period it acted unreasonably.

Thus, this case is in precisely the same posture as *Champlin*, where this Court held that the issue of mitigation of damages required a retrial on both liability and damages. There is no basis for treating the first jury's finding as a determination that AT&T acted in bad faith from the very beginning; instead, the jury could very well have concluded that AT&T should have received the FCC's message later, but there is no way of knowing when. At whatever point this is, however, MCI also should have gotten the message and sought relief from the FCC. If the second jury were to award damages to MCI for AT&T's interconnection conduct, the time period selected by the second jury would be crucial to the determination of those damages, yet it is also inextricably interwoven with the evidence on and determination of liability.[9]

Similar problems are apparent on the face of each of the liability findings. For example, there is no way a new jury could properly determine damages from the finding that AT&T provided "inappropriate *or* inefficient equipment *or* procedures for inter-

[9]See also *Fury Imports, Inc.* v. *Shakespeare Co.*, 554 F.2d 1376, 1388 (5th Cir. 1977) (remand for a new trial on both liability and damages on the grounds that "the question of causation is so intimately tied to the question of damages" and that "the jury's verdict on damages at the first trial suggests some rather fundamental confusion, the source of which is impossible to trace"); *Vizzini* v. *Ford Motor Co.*, 569 F.2d 754, 761 (3d Cir. 1977) (reversal for new trial on both liability and damages because "it is difficult to say that allowing a second jury to determine the issue of damages in isolation of the whole of the circumstances surrounding the case was not an injustice"); *Northeastern Tel. Co.* v. *American Tel. & Tel. Co.*, *supra*, 651 F.2d at 95 (reasonableness of AT&T's conduct is a "crucial issue at both the liability and damages phases of any further proceedings").

connection" (Int. 5(h), App. A, 237a) (emphasis supplied). MCI introduced evidence on such matters as the type of signalling provided to MCI, the types of connecting blocks provided to MCI, the kind of design information made available to MCI, the use of Bell's regular trouble reporting procedures instead of establishing a special procedure for MCI, the refusal to engage in joint testing with MCI, and MCI's access to Bell's equipment rooms (see App. A, 121a-124a). The jury interrogatory, framed in the disjunctive, allowed the jury to find for plaintiffs on less than all of these disputes. See *E.I. DuPont de Nemours & Co.* v. *Berkley & Co., Inc.*, 620 F.2d 1247, 1257-58 (8th Cir. 1980). And as in *Champlin*, the jury's damage award was less than the total damages claimed and, consequently, "cannot be taken as establishing any of these material facts." 283 U.S. at 500. Under these circumstances, a second jury cannot possibly tell what "equipment *or* procedures" the first jury actually found to be "inappropriate *or* inefficient" (emphasis supplied).

Similarly, the jury's finding with respect to the size of the geographic areas in which Bell provided local distribution facilities to MCI does not indicate to a second jury in what cities the local distribution area (LDA) was found to be unreasonable or what would have been a reasonable LDA, only that LDAs drawn by AT&T were "unreasonable" (Int. 5(f), App. A, 237a). Given the vast differences in the size of the LDAs to reflect differing local conditions from city to city, it is not at all unlikely that the jury found the LDA reasonable in some cities and unreasonable in others. Thus, any new trial on damages stemming from AT&T's drawing of LDAs necessarily requires the second jury to determine what would be a reasonable LDA and in which cities the LDAs were unreasonable; but that determination lies at the heart of the liability issue that the Court of Appeals would treat as conclusively established by the first jury.

In short, the liability findings on the remaining interconnection charges in this case are simply too ambiguous to permit fair cal-

culation of damages by a second jury. No matter how much discretion the trial court retains to admit "liability" evidence bearing upon damages,[10] the parties can never reconstruct the jury's liability findings without denying AT&T its right to fair and reasoned consideration of the issues. For this additional reason, the decision below conflicts with *Champlin*.

III. The Court Of Appeals' Decision Will Undermine The Administration Of Justice.

By replacing the "clear absence of taint" standard which other courts have held is required by *Champlin* with a "balancing" test, and by adopting a procedure that essentially requires a second jury to guess what a previous jury may have found, the Seventh Circuit effectuates the precise situation *Champlin* was intended to prevent: elevation of the convenience of the court and the prevailing party over the defendant's constitutional right to a fair trial. The court apparently believed this reversal of priorities was justified by the "unusual" size and complexity of this case. But, if anything, such considerations dictate even more vigilant enforcement of the right to a fair trial — not less. Where a complex case is presented, multiple errors may occur, and this is

[10] In its order denying rehearing, the Court of Appeals declined even to confront the question of ambiguity in the findings, except to offer the suggestion that the trial court could minimize any possible prejudice to AT&T by employing "the procedures described in this Opinion" for separating "the issues relevant to damages for trial" (App. B, 242a). Neither the "procedures" set forth in the decision nor the availability of later judicial review will prevent a denial of AT&T's rights should the present order stand. The "procedures" upon which the court rested its decision are no more than the following (App. A, 156a):

> "To the extent it is necessary to educate the fact finder on these issues [relating to settled liability questions], evidence which might normally be associated with a determination of liability may have to be introduced or reintroduced."

At most, this affords the trial court the discretion to admit selected liability evidence; it is obviously no substitute for affording AT&T the *right* of retrial. Furthermore, the decision authorizes admission for only a limited purpose: to show *amount* of damages, not fact of liability.

particularly true when the case is tried to a jury.[11] And antitrust cases in particular, with the punitive trebling of damages, demand the utmost effort to assure that a defendant has a full and fair opportunity to defend itself.

The goal of judicial economy is laudable. If it is allowed to take precedence over a party's fundamental right to a fair trial, however, the administration of justice will surely suffer. Indeed, if the Court of Appeals' decision goes unreviewed at this time, the ultimate outcome may be a third trial to remedy the improper limitations which the Court of Appeals imposed on the second trial. This Court should grant certiorari as to this limited issue to assure that such a result does not occur.

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[11] *Cf.* Burger, Remarks to Meeting of Conference of Chief Justices (August 7, 1979) (U.S. Supreme Court Public Information Office). See also *In re Japanese Electronics Products Antitrust Litigation*, 631 F.2d 1069, 1084-90 (3d Cir. 1980); *Bernstein* v. *Universal Pictures, Inc.*, 79 F.R.D. 59, 67-71 (S.D.N.Y. 1978); *ILC Peripherals Leasing Corp.* v. *IBM Corp.*, 458 F. Supp. 423, 444-49 (N.D. Cal. 1978), *aff'd on other grounds*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981). See generally Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898 (1979).

CONCLUSION

For the reasons set forth above, this Court should grant the petition for writ of certiorari and reverse the judgment below insofar as it limits the retrial of the remaining interconnection issues to damages alone.

Respectfully submitted,

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